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No. 112

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In the Supreme Court of the United States

October Term, 1962

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 212

PATRICK HENRY, DAVID D. LARSEN, STEWART B. KETT, JAMES B. GLENN, JR., d/b as SUBURBAN BROADCASTERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 302 F. 2d 191. The decision and order of the Federal Communications Commission (J. App. 52-55)[1] is reported at 30 F.C.C. 1021.

[1] "J.App." refers to the joint appendix in the court of appeals.

JURISDICTION

The judgment of the court of appeals affirming the decision of the Commission was entered on March 29, 1962 (Pet. App. 6a). The petition for a writ of certiorari was filed on June 26, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 402(j) of the Communications Act of 1934, 47 U.S.C. 402(j).

QUESTION PRESENTED

Whether the Federal Communications Commission may deny a radio station license on the ground that the applicant is unfamiliar with the community proposed to be served and has made no attempt to familiarize itself with the community's needs and interests.

STATUTE INVOLVED

Certain pertinent sections of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*, are set out in the Appendix to the petition (Pet. App. 7a). Section 307(a) of the Act, 47 U.S.C. 307(a), reads as follows:

> The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

STATEMENT

Petitioner, a California partnership, hereafter sometimes referred to as Suburban, filed an application

with the Federal Communications Commission for a permit to construct a new FM radio station in Elizabeth, New Jersey. The application was designated for hearing on issues relating to the interference which the new station would cause to station WNEW-FM, New York City, operated by Metropolitan Broadcasting Corporation (Metropolitan). The Commission made Metropolitan a party to the proceeding because of the interference question, and found that, except as indicated by the specified issues, Suburban was legally, technically, financially and otherwise qualified to construct and operate the proposed station (R. 101-102).[2]

On May 23, 1960, on petition by Metropolitan, which claimed that Suburban's programming proposals had not been designed for Elizabeth, and were essentially identical with the proposals of Suburban in an application for a new FM station at Berwyn, Illinois, and the proposals of two of Suburban's partners for a station at Alameda, California[3] (R. 111-112), the Commission ordered that the issues be enlarged to include the following (R. 241-213):

> To determine whether the program proposals of Suburban Broadcasters are designed to and would be expected to serve the needs of the proposed service area.

Hearing on the issue of the petitioner's program proposals was held on July 12, 1960. The record

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[2] "R." refers to the record filed in the court of appeals.

[3] The application for the station at Alameda was granted; the Berwyn application was dismissed.

showed that none of Suburban's partners had ever resided in Elizabeth, that the program proposal had been prepared in California without any prior consultation or contact with any person in Elizabeth, and that the program schedules for Elizabeth had been copied from those prepared for Alameda.

On October 3, 1960, the Hearing Examiner released an initial decision proposing to grant Suburban's application (R. 368-385). He resolved the program planning issue in favor of petitioner, although he noted that its approach might be characterized as "cavalier" or little more than a "quick shrug" (R. 383).

Oral argument was held before the Commission on April 13, 1961. On July 5, 1961, the Commission, with one Commissioner absent and two dissenting, released its final decision of June 28, 1961, denying Suburban's application (30 F.C.C. 1021). The Commission adopted most of the Examiner's findings, as well as his resolution of the interference question in favor of Suburban. On the issue of programming the Commission reversed the Examiner, stating (30 F.C.C. at 1022):

> We agree that Elizabeth has a presumptive need for a first local FM transmission service. We have generally presumed that an applicant for such a community would satisfy its programming needs, assuming that the applicant had at least a rudimentary knowledge of such needs. However, we cannot indulge in that presumption where the validity of the underlying assumption is questioned, a specific issue is added, and it

is demonstrated that the applicant has taken no steps to familiarize himself with the community or its needs.

The Commission held (30 F.C.C. at 1022):

> It is not sufficient that the applicant will bring a first transmission service to the community—it must in fact provide a first local outlet for community self-expression. Communities may differ, and so may their needs; an applicant has the responsibility of ascertaining his community's needs and of programming to meet those needs. As found by the Examiner, Suburban's principals made no inquiry into the characteristics of Elizabeth or its particular programming needs. The instant program proposals were drawn up on the basis of the principals' apparent belief—unsubstantiated by inquiry, insofar as the record shows—that Elizabeth's needs duplicated those of Alameda, California, and Berwyn, Illinois, or, in the words of the Examiner, could "be served in the same manner that such 'needs' are served by FM broadcasters generally."

The Commission concluded that Suburban's program proposals had not been designed to serve the needs of Elizabeth and that a grant could not be found to be in the public interest. Since Suburban had made no showing as to Elizabeth's programming needs, the Commission stated that it could not determine whether Suburban's program proposals would be expected to meet such needs (30 F.C.C. at 1023).

The court of appeals unanimously affirmed the Commission's order (Pet. App. 1a-5a). The court rejected Suburban's contention that the grant of a license was

mandatory where the sole applicant for a frequency established his legal, financial and technical qualifications. The court ruled that Suburban's view reflected an arbitrarily narrow understanding of the statutory words "public convenience, interest, or necessity", and rejected the contention that any consideration of Suburban's programming proposals was precluded by the statutory proscription against censorship and the constitutional guarantee of free speech. It stated (Pet. App. 4a-5a):

> We think these broad contentions are beside the narrow point at issue upon this record. * * * As we see it, the question presented on the instant record is simply whether the Commission may require that an applicant demonstrate an earnest interest in serving a local community by evidencing a familiarity with its particular needs and an effort to meet them.
>
> We think *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), settles the narrow question before us in the affirmative. There, the Commission promulgated regulations which provided, *inter alia*, that no license would be granted to stations whose network contracts would prevent them from developing programs "to serve the needs of the local community." 319 U.S. at 203. National Broadcasting Company challenged the regulations on precisely the grounds appellants advance here: that since the regulations were calculated to affect program content, they exceeded statutory and constitutional limitations. In sustaining the regulations, the Supreme Court held that the Commission may impose reasonable restrictions upon the grant of

licenses to assure programming designed to meet the needs of the local community. We think it clear that the Commission's action in the instant case reflects no greater interference with a broadcaster's alleged right to choose its programs free from Commission control than the interference involved in *National Broadcasting Co.*

ARGUMENT

1. The contention of Suburban that the Commission is required to grant a license to an applicant who is unfamiliar with the community it seeks to serve, and who has made no effort to learn the community's needs and interests, presents no important question warranting further review by this Court.

No act of censorship or other denial of the right of free speech was involved in the Commission's denial of Suburban's application. The Commission did not attempt to determine on the basis of its own judgment that any of Suburban's programs were undesirable or should not be broadcast. It held only that it could not conclude that a grant of Suburban's application would serve the public interest, convenience, and necessity, where, as the court of appeals agreed, the applicant had failed to "demonstrate an earnest interest in serving a local community by evidencing a familiarity with its particular needs and an effort to meet them" (Pet. 5a).

The Communications Act of 1934 provides that the Commission may issue a radio station license only if the public interest, convenience, and necessity will be served thereby. Sections 307(a), 309(a), 47 U.S.C.

307(a), 309(a). The law is well established that, in applying this standard, the Commission has authority to concern itself with the service to be rendered by a licensee, and that such concern, within the limits adhered to in this case, does not constitute censorship or a denial of the right of free speech. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 215-216, 226; *Simmons* v. *Federal Communications Commission*, 83 App. D.C. 262, 169 F. 2d 670, *certiorari denied*, 335 U.S. 846.[4]

In *National Broadcasting Co.* v. *United States*, *supra*, this Court sustained the validity of the Commission's chain broadcasting regulations, which were designed in substantial part to preserve a licensee's freedom to develop a local program service (319 U.S. at 202-204), stating (319 U.S. at 226):

> We come, finally, to an appeal to the First Amendment. The Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby

[4] These cases render unavailable petitioner's claim (Pet. 6) that this case marks the first instance of the Commission's assertion of such authority. In *Simmons*, although the proceeding was between competing applications, the appellant's application was denied on non-comparative grounds because the local interests of the community would not be adequately served by the appellant's program policy. See also *KFKB Broadcasting Assn.* v. *Federal Radio Commission*, 60 App. D.C. 79, 81, 47 F. 2d 670, 672; *Trinity Methodist Church* v. *Federal Radio Commission*, 61 App. D.C. 311, 62 F. 2d 850, *certiorari denied*, 284 U.S. 685, 288 U.S. 599.

> denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. * * * The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of "public interest"), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

Suburban clearly has not shown that this principle is any the less applicable today. Despite the increase in the number of competitive broadcast outlets in recent years (Pet. 10), the radio spectrum remains inadequate to accommodate all who seek to use it.[5]

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[5] See Annual Report of the Federal Communications Commission for 1959, pp. 159-160. See also *Bendix Aviation Corp. v. Federal Communications Commission*, 106 App. D.C. 304, 272 F. 2d 533, *certiorari denied sub nom. Aeronautical*

The necessity of protecting the public's interest in the use of scarce frequencies in the public domain has not lessened since 1943.

2. Suburban's further contention (Pet. 11-13) that the Commission's action is inconsistent with this Court's decision in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, misreads that decision.

In the *Sanders* case, this Court held that competitive economic injury to an existing station from the grant of a new facility created standing in the affected station, but that such injury was not a relevant public interest factor to be considered by the Commission unless it resulted in injury to the public. While the Court stated (309 U.S. at 475) that the Commission is given no "supervisory control" over programs, it recognized that the public interest requires consideration by the Commission of the service to be rendered (309 U.S. at 475-476).[6] This decision, which did not directly involve programming, can hardly be read as removing from the Commission's jurisdiction all concern with what the Court described as "[a]n important element of public interest and con-

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Radio, Inc. v. *United States*, 361 U.S. 965, for an example of the difficult problems still arising from an inadequacy of spectrum space.

[6] This Court later cited the *Sanders* and *National Broadcasting Co.* decisions for the proposition that, "Although the licensee's business as such is not regulated, the qualifications of the licensee and the character of its broadcasts may be weighed in determining whether or not to grant a license * * *." *Regents of the University System of Georgia* v. *Carroll*, 338 U.S. 586, 598.

venience", *i.e.*, "the ability of the licensee to render the best practicable service to the community reached by his broadcasts." (309 U.S. at 475.) The Commission's decision here does no more than preserve that ability. As the court of appeals held, the Commission imposed a reasonable test of basic qualification under the public interest standard of the Communications Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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